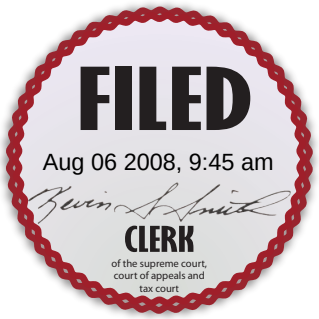


ATTORNEY FOR APPELLANT:

**JOHN R. FRECHETTE**
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

**TIMOTHY S. SHELLY**
**ANDREW M. HICKS**
**ANNE L. EISELE**
Warrick & Boyn, LLP
Elkhart, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| RENAISSANCE REMODELING, INC., d/b/a DBR PLUMBING, INC., | ) | |
| Appellant-Plaintiff, | ) | |
| vs. | ) | No. 20A03-0802-CV-46 |
| J&L CARGO EXPRESS, INC., | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
The Honorable David A. Denton, Magistrate
Cause No. 20D06-0608-PL-16

**August 6, 2008**

**MEMORANDUM DECISION—NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-plaintiff Renaissance Remodeling, Inc., d/b/a DBR Plumbing, Inc. (DBR), appeals the trial court's judgment in favor of appellee-defendant J&L Cargo, Inc. (J&L), claiming that a damage award was improper because the evidence established that J&L had violated a bailment agreement by failing to return a trailer to DBR. DBR raises a number of issues, which we have consolidated and restated as follows: (1) whether the trial court properly awarded damages to J&L, which represented the value of a trailer it had loaned to DBR that was subsequently stolen; (2) whether the trial court erred in offsetting the total judgment award as a result of DBR's counterclaim against J&L for the loss of use of its trailer; and (3) whether the trial court abused its discretion in awarding mediation sanctions against DBR. Finding no error, we affirm the judgment of the trial court.

## FACTS

J&L is a family-owned Indiana corporation located in Bristol that manufactures and distributes dump trailers through various dealers. DBR, a New York corporation that does business in Syracuse, purchased an 80 x 12 twin dump trailer for $6370 from Anthony Tauro Used Cars (Tauro) on July 28, 2004, that J&L had previously sold to Tauro. Quality Steel & Aluminum (Quality Steel) was the manufacturer of the unit.

Following the purchase, DBR began using the dump trailer on a daily basis in the Syracuse area. DBR would place the trailer at various construction sites, fill it with debris, and subsequently transport the trailer to a landfill to be emptied. On occasion, DBR used the trailer to haul stone, topsoil, and small equipment.

At some point, the trailer began to "blister" after it was used over the course of two harsh winters in Syracuse. Appellee's App. p. 35-36. As a result, in May 2006, Tauro and J&L arranged to have the exterior of the trailer repainted. J&L and Quality Steel determined that the trailer was under warranty. Although the warranty work was to be performed in Elkhart County, the warranty provisions did not require J&L or Quality Steel to incur the cost of transporting the trailer for repair. However, apparently in an effort to accommodate DBR, J&L agreed to pay the costs of transporting DBR's trailer from Syracuse to Bristol at a cost of approximately $585. Also, at DBR's request, J&L agreed to loan DBR a new, current model-year trailer while the unit was being repaired.

On May 9, 2006, a driver for J&L drove to Syracuse to deliver the loaned trailer to Tauro. Approximately three days later, DBR representative James Hartford delivered the used trailer to Tauro and picked up the loaned trailer. The loaned trailer was equipped with a "tongue lock" to protect the trailer from being stolen. Appellee's App. p. 39. In order to connect the dump trailer to DBR's vehicle, a Tauro representative removed the tongue lock and placed it in his desk. DBR also had its own tongue lock for its trailer, but when Hartford picked up the trailer, he did not have a lock for the loaner. Moreover, he did not ask to borrow the one that he saw the Tauro agent place in the desk.

DBR returned to its premises with the loaned trailer, but no DBR representative took any steps to secure that trailer. The trailer was parked on a city-owned lot that did not permit fences or gates. Moreover, the lot was connected to a "busy" road. Appellant's App. p. 61-62. DBR did not secure the loaned trailer once it was parked on the lot. Although Tauro was less than four miles away, no representative of DBR

returned to Tauro to obtain a tongue lock or other device to secure the trailer. Between May 12, 2006, and May 17, 2006, the trailer that J&L loaned to DBR was stolen from the lot.

On July 13, 2006, Quality Steel completed the repaint of DBR's trailer. Representatives from J&L notified DBR that the trailer had been repaired and demanded return of the loaned trailer. However, when J&L learned that the trailer had been stolen and could not be returned, J&L refused to return the repaired trailer to DBR.

On August 28, 2006, DBR filed a complaint for damages and a motion for immediate possession of the trailer. DBR alleged that J&L refused to surrender possession of the trailer, that it was unlawfully possessing the trailer, and that J&L had converted the trailer to its own use. Thus, DBR requested damages for its loss of use of the trailer, conversion, costs of the action, expenses, and attorney's fees. J&L denied the allegations and counterclaimed, alleging that as part of the warranty claim procedure, DBR agreed to exchange or return the loaner trailer when the warranty work was completed on the trailer that DBR had purchased. J&L further alleged that because DBR failed to return the loaned trailer, DBR had unlawfully converted the trailer to its own use. Thus, J&L requested damages for DBR's loss of the trailer, conversion, court costs, and attorney's fees.

On September 21, 2006, the trial court denied DBR's request for immediate possession of the trailer, ordered that the trailer remain in J&L's possession, and referred the case to mediation. Mediation was scheduled for January 23, 2007. While counsel for J&L, its president, and DBR's counsel appeared, no representative from DBR attended

the mediation. It was later learned that DBR's counsel lacked the authority to fully settle the matter.

On February 5, 2007, the mediators informed the trial court that the mediation had been unsuccessful. As a result, J&L filed a motion for mediation sanctions and an affidavit in support of attorney's fees requesting that the trial court impose sanctions because a DBR representative failed to attend the court-ordered mediation.

On March 27, 2007, a bench trial commenced, evidence was presented, and both parties subsequently submitted proposed findings of fact and conclusions of law. Thereafter, on September 7, 2007, the trial court entered its findings and entered judgment for J&L in the amount of $6550 and sanctions against DBR for not attending the mediation. The trial court then offset $1814 of the award to compensate DBR for its damages regarding its loss of use of the trailer. More particularly, the trial court found as follows:

> 9. It appears . . . that there are two (2) separate causes of action involved here. First, the claim by the plaintiff for the failure to return the trailer to plaintiff when the unit was repaired and the other by the defendant for the failure of plaintiff to properly secure the loaner trailer pending repairs to plaintiff's trailer. Both instances were bailments, giving rise to duties of both plaintiff and defendant. The bailment of the loaner unit was a bailment for the benefit of the plaintiff and the plaintiff owed a higher duty to preserve the property to return the same to the defendant at the conclusion of the bailment. The repair of the original unit was also a bailment and the defendant owed a duty to return the unit to plaintiff with the repairs completed.
>
> 10. The court finds that the defendant violated the conditions of the bailment by holding the unit as security for return of the loaned unit. Defendant's actions fall short of conversion since the unit is still available. The plaintiff violated the terms of the bailment by failing to properly secure the loaned unit while it was in his possession.

11. The agreement between the plaintiff and defendant was not clear at the time the loaner was delivered to plaintiff. The parties specified no terms or conditions and defendant was not granted a lien or right of retention in the original unit until the loaner unit was returned and plaintiff did not agree to give defendant a lien or possessory interest in the unit owned by plaintiff until the loaner was returned.

12. Because the parties failed to prove the terms of the agreement, the court is not able to assess more than pecuniary damages to each of the parties.

13. During the pendency of this suit, the plaintiff failed to attend a deposition[1] giving rise to expenses and attorney's fees incurred by defendant which should be granted in addition to the value of the unit loaned to plaintiff.

14. The value of the loaned trailer was $4,750.00 and defendant is entitled to recover that amount from plaintiff. In addition, defendant is entitled to recover sanctions for the failure of plaintiff to send a representative to a deposition and the court finds that $1,800.00 is a reasonable fee for plaintiff's attorney to prepare for and attend the deposition.

15. The plaintiff submitted evidence to show that a trailer was rented from Rid-O-Vit and used as a replacement for the loaner unit at a total cost of $2,456.23. The invoices from Rid-O-Vit to plaintiff ran from May, 2006 to March, 2007, but varied as to the services provided. The court is unable to ascertain whether all or part of the charges were allocable to the replacement of plaintiff's trailer, but the least amount is $1,814.00 and the court will allow that amount.

16. The claim of plaintiff, $1814.00, is offset by defendant's counter claim of $6550.00, leaving a net due defendant on its counterclaim of $4,736.00 and the court enters judgment accordingly.

DBR now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

[1] We presume that the trial court inadvertently stated that DBR had failed to attend a deposition rather than the scheduled mediation.

Where, as here, the trial court has entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. Bowyer v. Ind. Dep't of Natural Res., 882 N.E.2d 754, 761 (Ind. Ct. App. 2008). The trial court's findings and conclusions will be set aside only if they are clearly erroneous; that is, if the record contains no facts or inferences supporting them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Id. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. Id. We review conclusions of law de novo. Id.

## II. DBR's Claims

### A. Damage Award

DBR contends that the damage award to J&L was erroneous. Specifically, DBR maintains that the trial court erred in determining that it had breached the bailment agreement and argues that J&L was not entitled to any damages.

In resolving this issue, we initially observe that "a bailment is an express or implied agreement between a bailor and a bailee in which the bailee is entrusted to accomplish a specific purpose with the bailor's personal property and when the purpose is accomplished, the property is returned to the bailor." Turner v. Clary, 606 N.E.2d 878, 880 (Ind. Ct. App. 1993). The standard of care that a bailee is required to utilize varies depending upon the amount of benefit each party derives from the bailment. Norris Auto. Serv. v. Melton, 526 N.E.2d 1023, 1026 (Ind. Ct. App. 1988). When the bailment is for

the sole benefit of the bailee, the bailee is required to use great care. Id. When the bailment is for the mutual benefit of both parties, the bailee is required to use ordinary care. Id. Whether or not the bailee has complied with the expected standard of care is a question that is reserved for the trier of fact. Id.

We also note that a prima facie case of negligence exists upon proof that a bailment existed and damage occurred. Dado v. Jeeninga, 743 N.E.2d 291, 294 (Ind. Ct. App. 2001). Once the bailor has established a prima face case of negligence, to rebut the presumption of negligence, the bailee must establish that the loss was caused through no fault of the bailee. Gen. Grain, Inc. v. Int'l Harvester Co., 142 Ind. App. 12, 232 N.E.2d 616, 618 (1968).

In this case, DBR argues that the evidence established that both parties received a benefit from the loaned trailer as a result of the bailment. Therefore, DBR maintains that it owed only a duty of ordinary care and that the record is devoid of any evidence establishing that DBR breached that standard of care.

Contrary to DBR's contentions, the evidence at trial established that J&L had no obligation under the warranty to provide DBR with a new, current model-year trailer as a loaner while the other unit was being repaired. Appellant's App. p. 101. Indeed, evidence was presented demonstrating that J&L loaned the trailer to DBR even though it was outside of its normal business practice to do so. Id. at 101. In light of this evidence, the trial court properly determined that the bailment agreement regarding the loaned trailer inured to the sole benefit of DBR.

Moreover, the evidence supported the trial court's conclusions that DBR was

negligent and that it breached the bailment agreement. In particular, a DBR representative testified that the trailer was stolen shortly after J&L had entrusted it to DBR. Appellant's App. p. 44, 78. DBR took no steps to secure the J&L trailer even though it routinely secured the other trailers that it parked on the lot. As a result, the finding of the existence of a bailment, coupled with DBR's loss of the loaned trailer, established a prima facie case of negligence by DBR.

We also note that DBR presented no evidence to rebut the presumption of its negligence, and there was no evidence demonstrating that the loss had not been caused—at least in part—by its failure to secure the trailer. As noted above, the evidence established that with the exception of J&L's trailer, DBR usually secured the trailers that were parked in the lot. Id. at 85. Moreover, DBR knew that Tauro had retained the tongue lock that had been used to secure the trailer. Appellee's App. p. 309. In light of this evidence, DBR failed to rebut the prima facie showing of negligence because it could not demonstrate that the trailer was lost through no fault of its own. Furthermore, the trial court properly determined that a fair price for the new trailer was $4750, which was based upon the amount that J&L would have invoiced Tauro had the trailer not been a loaner.[2] Appellant's App. p. 141. For these reasons, DBR's claim that the trial court erred in awarding damages to J&L fails.

B. Offset of Damage Award

In a related argument, DBR contends that the trial court erred in offsetting the

[2] DBR has not challenged the value that the trial court assigned to the new trailer.

award to J&L by $1814 and claims that it should have been awarded damages for J&L's conversion of its trailer. In essence, DBR claims that it established all elements of conversion and, therefore, the trial court should have awarded damages to it in an amount not exceeding three times the actual damages, costs, and attorney fees.

We initially observe that Indiana Code section 35-43-4-3 defines conversion as "knowingly or intentionally exerting unauthorized control over property of another person." One means of exerting control over property is to possess the property. I.C. §35-43-4-1(a). Control is unauthorized if it is without the owner's consent or in a manner or to an extent other than that to which the owner has consented. I.C. § 35-43-4-1(b)(2). Additionally, civil damages are available for conversion in accordance with Indiana Code section 34-24-3-1. However, we also note that the mens rea requirement differentiates criminal conversion from the more innocent breach of contract or failure to pay a debt situation that the criminal conversion statutes were not intended to cover. Gilliana v. Paniaguas, 708 N.E.2d 895, 899 (Ind. Ct. App. 1999). Put another way, the legislature did not intend to criminalize bona fide contract disputes. Nations Credit Commercial Corp. v. Grauel Enters., 703 N.E.2d 1072, 1079 (Ind. Ct. App. 1998). In disputes regarding the interpretation of contracts between sophisticated business entities, our courts have consistently held that the ambiguity in interpreting a contract or agreement, by itself, is enough to preclude the finding of the mens rea necessary for criminal conversion. Gilliana, 708 N.E.2d at 900.

In this case, the evidence showed that J&L and its employees believed that the agreement for swapping trailers required DBR to return the loaned trailer before or

contemporaneously with J&L's return of the other trailer to DBR. Appellant's App. p. 82. However, after DBR informed J&L that the trailer had been stolen, DBR refused to pay J&L for the value of the trailer. Appellee's App. p. 40, 47. After hearing the evidence, the trial court determined that the terms of any alleged agreement between the parties were not clear regarding the trailer's return. More specifically, the evidence supports the trial court's conclusion that no terms or conditions of any alleged agreement between the parties were specified, and there was no showing that J&L was granted a lien or right of retention in the original trailer. Id. at 12. Thus, it was reasonable for the trial court to conclude that a contract dispute existed between the parties and a claim for criminal conversion could not prevail. Therefore, DBR's contention that it was entitled to damages for J&L's alleged conversion of its trailer fails.

We similarly reject DBR's claim that the trial court improperly calculated the amount of damages awarded in its favor that was used to offset the judgment in favor of J&L. In general, the computation of damages is a matter within the trial court's sound discretion. City of Clinton v. Goldner, 885 N.E.2d 67, 75 (Ind. Ct. App. 2008). When a trial court's computation of damages is challenged, we employ a limited standard of review. Prime Mortgage USA, Inc. v. Nichols, 885 N.E.2d 628, 656 (Ind. Ct. App. 2008). Moreover, no degree of mathematical certainty is required in awarding damages as long as the amount awarded is supported by evidence in the record. Gasway v. Lalen, 526 N.E.2d 1199, 1203 (Ind. Ct. App. 1988). A damage award must be supported by probative evidence and cannot be based on mere speculation, conjecture, or surmise. Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 101 (Ind. Ct. App.

1999). In evaluating the damage award, we will not reweigh the evidence or judge the credibility of the witnesses, and will consider only the evidence favorable to the award. Crider & Crider, Inc. v. Downen, 873 N.E.2d 1115, 1118 (Ind. Ct. App. 2007). Therefore, a damage award will be reversed only when it is not within the scope of the evidence before the finder of fact. 4-D Bldgs., Inc. v. Palmore, 688 N.E.2d 918, 921 (Ind. Ct. App. 1997).

As set forth above, the trial court entered a total damage award of $6550 in J&L's favor. Appellant's App. p. 13. This award was comprised of $4750, representing the value of J&L's loaned trailer that was stolen, and $1800 for mediation sanctions. Id. At trial, a shipping invoice to Tauro dated September 30, 2005, showed that a new trailer had a wholesale value of $4750. Id. at 141. And an affidavit regarding attorney fees that was attached to J&L's motion for mediation sanctions supported the award of $1800.

The evidence presented at trial also supports the award of damages in the amount of $1814 to DBR to offset the total judgment award. Specifically, the only testimony as to the value of the used trailer was presented by Lyle Miller, J&L's president, who testified that it was worth approximately $2000 before the repairs. Appellee's App. p. 50. The trial court used a separate calculation based on the difference between the invoices of the dumpster service that DBR used before and after it received J&L's trailer, which the trial court determined to be $1814. Id. As a result, either method of computation leads to the same equitable result: DBR received a fair value for its used trailer as an award of damages. Hence, the trial court correctly determined that this amount could offset the amount that was owed to J&L, and the record shows, therefore, that the net damages due

to J&L amounted to $4736. Id. Hence, DBR's claim fails because the damages award was within the scope of the evidence presented at trial.

C. Mediation Sanctions

Finally, DBR argues that the trial court abused its discretion in awarding mediation sanctions against it. Specifically, DBR maintains that J&L's unverified motion for sanctions set forth only unsworn allegations that DBR acted in bad faith. Moreover, DBR maintains that the evidence was not sufficient to support a finding of bad faith merely because a representative of the company was not present at the mediation.

In addressing DBR's contentions, we initially observe that Indiana Trial Rule 11(A) provides that "[e]xcept when specifically required by rule, pleadings or motions need not be verified or accompanied by affidavit." In this case, J&L's motion for sanctions was filed pursuant to Indiana Alternative Dispute Resolution Rule 2.10, which states, "[u]pon motion by either party and hearing, the court may impose sanctions against any attorney, or party representative who fails to comply with these mediation rules, limited to assessment of mediation costs and/or attorney fees relevant to the process." Because Rule 2.10 does not specifically require a verified motion for sanctions, DBR's claim fails on this basis.

Additionally, as discussed above, the trial court ordered the parties to attend a mediation on January 23, 2007. Appellee's App. p. 14-15. To facilitate serious settlement discussions, Indiana Alternative Dispute Resolution Rule 2.7(B)(2) requires all parties and their attorneys to attend mediation unless excused by the court. There are several purposes of this requirement, including the following: authority to settle at the

mediation is assured and settlement is facilitated by creating an environment where the parties and their attorneys "hopefully receive and appreciate the points of view of the other parties and the mediator." Georgos v. Jackson, 790 N.E.2d 448, 454 (Ind. 2003).

In this case, the evidence established that even though the mediator contacted the parties to schedule mediation approximately two months in advance, DBR did not seek an excused absence from the trial court, and it did not offer any explanation for the absence even when it was afforded the opportunity to do so. Moreover, it was established that DBR's counsel did not have full authority to settle the matter in the absence of a company representative. Hence, the trial court could reasonably conclude that DBR's absence from the mediation negatively impacted the process and that the presence of DBR representatives would have facilitated the mediation process and might have advanced settlement discussions.

Notwithstanding these circumstances, DBR directs us to Smith v. Archer, 812 N.E.2d 218 (Ind. Ct. App. 2004), for the proposition that a party's absence from a mediation should not automatically result in the imposition of mediation sanction. In Smith, we observed that while the defendant's absence from the mediation was a technical violation of Alternative Dispute Resolution Rule 2.7(B)(2), it was not shown that the absence was in bad faith. Id. at 220-22. More particularly, the evidence showed that the defendant's counsel in Smith and an insurance adjuster were both present at the mediation. Moreover, the plaintiff's demand had never been greater than the policy limits that were included in the insurance policy. We observed that only the insurance company would be liable for the settlement amount and the defendant would not face

personal liability. Id. at 222. Therefore, the award of sanctions was set aside. In this case in contrast, DBR had no insurance coverage and DBR's absence at mediation substantially impacted the mediation process—particularly because DBR's counsel did not have full authority to settle the matter. Therefore, the trial court could reasonably conclude that DBR's conduct in failing to attend the mediation amounted to bad faith. As a result, we decline to set aside the amount awarded to J&L for mediation sanctions.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.